Chapter 6

A Three Dimensional – Code and a Question of the Normative Hyper-linking?

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1. A New Wave of Codifications – sometimes new content, but almost always old form

We are now experiencing in Europe a new wave of codifications.[1] Some of them are like a breath of fresh air; others merely develop or alter existing concepts. Appealing, however, is the reluctance to adopt new structures for the codes. The mode of the presentation of the legal matter remains mostly unaffected. Perhaps the most recent innovation in this field was (and this was more than 20 years ago) the new Dutch Civil Code. At least the system of numbering of the articles facilitates the development and the revisions of the text, albeit the quotation of the provisions is much more difficult. The system of the Dutch Civil Code is also interesting because it endorses a lot of the German tradition of the codification (one must remember that the starting point for the Dutch law is the French Code Civil), but it does not follow the pandectistic structure of the code.[2] Despite all of these innovations, since the pandectistic structure was developed and in reaction to it the anti-pandectis-

[1] R. Schulze, F. Zoll, *The Law of Obligations in Europe*, A New Wave of Codifitcations, Munich 2013.

[2] S. Grundmann, *The Architecture of European Codes and Contract Law – A Survey of Structures and Contents*, in: S. Grundmann, M. Schauer, *The Architecture of European Codes and Contract Law*, Alphen aan den Rijn 2006, p. 14–15.

tic codes (as a Swiss law)[3] drafted, nothing entirely new has happened which would revolutionize the structure of the codifications.

Whilst the use of technology has also changed the manner of usage of the legal texts immensely, it has not influenced the way in which texts are drafted. There is no structure of law which has developed with the express purpose of using new technology. The technological possibilities which have become available have not been taken into account in the process of drafting. The formal frames of the promulgation of the legal acts have not been changed, hence law-makers do not have a sufficient legal framework to experiment.

2. Academic drafts in the process of the Europeanization of the private law – PECL, DCFR, Gandolfi Draft – again, a rather conservative structure

The end of the 20th and the first decade of this century have been quite rich in terms of the various drafts pretending to restate the common European tradition, mostly of the contract law,[4] but also in the case of the DCFR which encompasses other fields of the private law.[5] In all these sources, the structure was not a field of experimentation and, for understandable reasons, they were more focused on the content. In case of the drafts related to the general contract law, the question of the structure was certainly not the primary concern. It was more complicated in case of the DCFR due to its scope, consisting of the big parts of the codification of the usual private law. The structure delivered by the DCFR is, however, also quite conservative. It also partially resembles a pandectistic structure,[6] even if it does not have a general part in the sense of the German Civil Code. It has not been drafted with the idea of being especially adjusted for electronic use.

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[3] See on the Swiss Civil Code K. Zweigert, H. Kötz, *Einführung in die Rechtsvergleichung* (Introduction to the Comparative Law), Vol. 3, Tübingen 1996, p. 165–176.

[4] O. Lando, H. Beale, *Principles of European Contract Law*, Parts I and II, Hague 2000; O. Lando, E. Clive, A. Prüm, R. Zimmermann, *Principles of Contract Law*, Part III, Hague 2003; C. von Bar, E. Clive, *Draft Common Frame of Reference*, DCFR Full Edition, Munich 2009; U. Magnus, *European Law of Obligation*, Munich 2002; G. Gandolfi, *Code Europeen des Contrats*, Livre Deuxième 1, Milan 2007, and 2, Milan 2008; P. Catala, *Avant-projet de réforme du droit des obligations et de la prescription*, Paris 2006; B. Fauvarque-Cosson, D. Mazeaud, *Principes contractuels communs*, Paris 2008.

[5] About the DCFR see: H.-W. Micklitz, F. Cafaggi, *European Private Law after the Common Frame of Reference*, Cheltenham 2010.

[6] On the structure on the Draft Common Frame of Reference see C. von Bar, E. Clive, *DCFR*, Vol I. Introduction, p. Intr. 31–37; F. Zoll, *A Need for a New Structure for European Private Law*, in: R. Brownsword, H.-W. Micklitz, L. Niglia, S. Weatherhill, *The Foundations of European Private Law*, Oregon 2001, p. 557–558.

3. Structure of the existing acquis communautaire on the area of the contract law

European private law is characterized by the patchwork of the directives with the relatively narrow scope of application and different modus of the organization of the legal matter.[7] The structure of European private law was for a long time not really a matter of concern, due to the fact that the European acquis communautaire was not drafted as a coherent system of law, but rather envisaged as a completion of the national systems. The directives are however characterized by a "problem approach" to the legal matter.[8] A reader looking for a certain problem in the given life situation will find a set of rules applicable to this particular situation at one place. These rules are, however, often feasible for generalization and in the case of national law (if this national law is equipped with a code) they would be usually placed on the more abstract level. The approach of the Union's law – the "problem approach" facilitates the process of the understanding of the law, but it creates difficulties in the process of the implementation of the law into the national systems. From the perspective of the national system, it is usually impossible to maintain sufficient coherency of the system.[9]

The first decade of the 21st century has brought a change in the approach of the Union related to the question of the systematization of law.[10] The coherency of national law has been identified as a problem and the various communications of the Commission has formulated a program of achieving

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[7] H. Schulte-Nölke, F. Zoll, *Structure and Values of the Principles: New features and their possible use for political puposes*, in: Research Group on the Existing EC Private Law (Acquis Group), *Principles of the Existing EC Contract Law (Acquis Pronciples) Contract II*, Munich 2009, p. xxiii–xxviii.

[8] H. Schulte-Nölke, F. Zoll, in: *Research Group on the Existing EC Private Law, Acquis Principles Contract II*, Munich 2009, p. xxv–xxvi.

[9] F. Zoll, *A need for a new structure of European Private Law*, in: R. Brownsword, H.-W. Micklitz et al., *The Foundations of European Private Law*, Oxford 2011, p. 559–560.

[10] Communication from the Commission to the European Parliament and the council, A more coherent European Contract Law – Action Plan, Brussels, 12.2.2003COM(2003) 68 final; Communication from the Commission to the European Parliament and the council, European Contract Law and the revision of the acquis: the way forward, Brussels, 11.10.2004 COM(2004) 651 final; Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses, Brussels, 01.07.2010 COM(2010)348 final; Regarding the meaning of the Communication of the Commission COM(2003)68 final see: C. von Bar, E. Clive, *DCFR*, Vol I. Introduction, p. Intr. 50; G. Howells, R. Schulze, *Modernising and Harmonising Consumer Contract Law*, Munich 2009, Introduction; F. Zoll, *Der Entwurf des Gemeinsamen Referenzrahmens und die Vollharmonisierung*, in: M. Stürner, *Vollharmonisierung im Europäischen Verbraucherrecht*, Munich 2010, p. 133–141; F. Zoll, *A need for a new structure of European Private Law*, in: *The Foundations of European Private Law...*, p. 560–561.

a higher level of coherency of the acquis communautaire. One of the ideas was the so-called framework directive.[11] It has ended up in the new directive on consumer rights,[12] which in a very limited way brings some traces of the systematization of the consumer law.

Moreover, the Commission has formulated a proposal for the Common European Sales Law, an optional instrument.[13] This draft is unique for European legislation, because it contains a coherent, self-standing set of rules encompassing a broad field of the contractual relationship with the purpose of direct application. The structure of this instrument is a combination of general and specific parts. It is a quite traditional model, at the same time not entirely coherent.[14] The drafters have (probably rightly) not experimented with the structure, although they were – not always consistently – trying to combine the user friendly problem approach with the general pandectistic structure. Hence, the rules concerning non-performance are artificially narrowed down (with the exception of damages) and repeated in case separately for the seller, buyer, service provider and customer. Other rules, having the same content of generality, are regarded as common rules for all contracts covered by the instrument. There is a draft proposed by the European Law Institute suggesting a more coherent approach to the structure of the CESL. In all these cases, electronic technology has not been seen as a possible main environment for the drafts (which also results from the existing formal requirements for the sources of law).

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[11] H. Schulte-Nölke, F. Zoll, in: *Research Group on the Existing EC Private Law, Acquis Principles Contract II*, p. xxv–xxvi; Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses, Brussels, 01.07.2010 COM(2010)348 final.

[12] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, Official Journal of the European Union of 22.11.2011, L 304/64.

[13] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, Brussels, 11.10.2011 COM(2011) 635 final 2011/0284 (COD); R. Schulze, Commentary on *Common European Sales Law (CESL)*, Baden-Baden 2012.

[14] H. Schulte-Nölke, *Scope and Function of the Optional Instrument on European Contract Law*, in: R. Schulze, J. Stuyck, *Towards a European Contract Law*, Munich 2011, p. 39–40. About the dogmatics, the methodology and structure of the Common European Sales Law see: C. Herresthal, *Zur Dogmatik und Methodik des Gemeinsamen Europöischen Kaufrechts nach dem Vorschlag der Kaufrechts-Verordnung*, in: H. Schulte-Nölke, F. Zoll, N. Jansen, R. Schulze, *Der Entwurf für ein optionales europäisches Kaufrecht*, Munich 2012, p. 88–106; On the Common European Sales Law see: M. Schmidt-Kessel, *Ein einheitliches europäisches Kaufrecht?*, Munich 2012.

4. The Acquis Principles

The Acquis Principles are probably the only text of all various European academic drafts which have been envisaged to also have in mind the technological possibility of presenting the legal text. Even this text was never presented in this way and its probable feasibility for the usage of new technologic platforms has never been tried, a perspective of the use of the technology has also been seen while drafting the structure of the Acquis Principles.[15] Hence, they are constructed in a way which tries to combine the problem approach of the directives with the new-pandectistic generalization. The structure of the Acquis Principles has been described in various places[16] and probably there is no need to do it in detail once again. I would therefore like to focus only on the issues which could be relevant from the perspective of their feasibility for the new technology for presenting a legal matter.

The Acquis Principles have been drafted in order to restate the European law spread through the numerous directives and other sources. Their purpose was to present the existing contract law of the EU as already a system, capable of governing contractual relationships. As I mentioned above, the European contract law is not constructed as a system, but it already has elements which – if one were to put them together, generalize them and sometimes fill the gaps – depicted an almost full-fledged contract law. By collecting and arranging the acquis communautaire on contracts, the drafters of this group were trying to combine two underlining principles of contract law which were in certain contradiction to each other: the problem approach of the directive, which also enables people without any background in law to understand or at least to have an impression of understanding of the legal text and the principle of generalization of rules, which are feasible for such generalization, which means that they can apply to other factual patterns as well, as those covered by the directive's scope of application. These two approaches are very difficult to reconcile, if only using them in two dimensional environments. However, the Acquis-Group has tried to find a way to unify these two approaches. Hence, the so called a "mirror structure"[17] has been invented. This mirror structure exists of numerous small general parts, e.g. on pre-contractual duties, formation of contract, unfair terms, performance and non-performance, etc. The small particular parts are added to each gene-

[15] F. Zoll, *A need for a new structure of European Private Law*, in: R. Brownsword, H.-W. Micklitz et al., *The Foundations of European Private Law...*, p. 555–561.

[16] C. von Bar, E. Clive, *DCFR*, Vol I. *Introduction...*, p. Intr. 31–37; F. Zoll, *A need for a new structure of European Private Law*, in: R. Brownsword, H.-W. Micklitz et al., *The Foundations of European Private Law...*, p. 557–558.

[17] F. Zoll, *A need for a new structure of European Private Law*, in: R. Brownsword, H.-W. Micklitz et al., *The Foundations of European Private Law...*, p. 559–560.

ral part, containing rules which are only applicable to specific situations like package travel, time sharing, distance contract, etc. It means that the particular rules on package travel appear in different places – not in one piece of legislation, but scattered through the text, linked to the small "general parts" so far as they modify them. The user of the text looking for the solution applicable in a non-performance situation will find particular and also general rules in one place. It is probably easier as in the usual pandectistic structure, where the non-performance provisions will appear in different places, since linking them usually requires a high level of competence.

The structure of the Acquis Principles allows the retention of certain advantages of the problem approach, but equally provides a system applicable to a range of situations, not directly covered by the particular rules. It may fulfil the function of national contract law, but is very strongly based on the values reflected by the acquis communautaire. The structure as used in the two-dimensional environment, however, cannot prove all advantages it possess. The user would find a set of rules in one place, related to package travel, belonging to a different level of generality, but still this user would face difficulties in linking this part of the text to other parts. The Acquis Principles may prove their full functionality only if displayed in three dimensions.

5. Acquis Principles in 3D

The "mirror structure" used in the three dimensions may facilitate further the usage of the text.[18] The use of technology would facilitate the operation on the text even at the simplest level. As I have discussed above, the particular rules (e.g. on non-performance in package travel) are linked with the general rules on non-performance. In practice, it is not so easy to link the particular with the general rules, due to the fact that the Acquis Principles have to deal with numerous situations, like payment services, consumer credits, independent agents, delayed payments, etc. A user does not see its particular rules on package travels directly below the general rules on non-performance. The use of technology would make it possible to display the rules, which cannot be seen in the text at one place as a coherent set of rules. By making a hyperlink it would be possible. Having a general rule, the user would find the links to the particular situation just below the general rule. By clicking on the rules of package travel, the main rule and the package-travel specific exception would be displayed in one connected portion.

[18] H. Schulte-Nölke, F. Zoll, *Research Group on the Existing EC Private Law, Acquis Principles Contract II...*, p. xxv–xxvi.

This hyperlinking would allow one to go even further in a such situation and connect the rules, belonging to the different part of the text. A person starting from a rule on damages could also click on rules on formation of the contract, on the right to withdraw and on the rule governing the content of performance. In this way, all of the relevant rules would be presented in one place, allowing the particular user to benefit from the problem approach, while the whole structure would remain its general feature as the codification encompassing a broad spectrum of legal relationships.

6. The normativity of the hyperlinking

Is it imaginable to have a code, where the hyperlinking between the different parts of this code would be also accepted as a normative expression of the law-maker?[19] In such a code the different parts would be connected with each that a person seeking an answer to the real problem of law would be able to display at one place a set of rules applicable to this particular problem. In such system trough the links the rule will obtain additional normative content through the links, because this link would also show with which rules located in the other part of law this one is especially connected. The code would get an additional dimension, because the system of references would allow the gathering of most of the relevant provisions applicable in the given case in one place. It would mean, however, that the existence of a hyperlink would be treated as a part of the norm – another sort of a legal reference. Of course, it could not exclude the necessity to also find another connection among the rules, beyond the system of the hyperlinks, but at least the most typical situations would be covered by such system. In that case the law would be better to adjust to the factual pattern and probably easier in application. A person looking for the answer of whether the bequeather could testate would connect the rule on capability to testate with the general rules governing the legal capacity of the physical persons and would get the complete set of the rules displayed at one place applicable to the given situation. It would require better coordination between different parts of the code, because a legislator would be forced to examine numerous connections, whether they create a reasonable body of law.

In the case of the Acquis Principles, a certain structure has been developed in which it will be easier to examine whether such hyperlinked code

[19] See also: F. Zoll, *Das Pandektensystem und die Vorschriften über den Vertragsschluss in der Struktur des polnischen Zivilgesetzbuches*, in: Ch. Baldus, W. Dajczak, *Der Allgemeine Teil des Privatrechts. Erfahrungen zwischen Deutschland, Polen und lusitanischen Rechten*, Frankfurt am Main 2013, p. 136–137.

could really work. One has to venture to prepare the software presented in this text in such an environment which would allow experimentation in the application of the law this way. Perhaps it is a path for the codification in the future which would be drafted to be displayed only electronically and only in the electronic environment would a rule get its full meaning.